Supreme Court, U.S.
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In The

Supreme Court of the United States

GUSTAVO E. COLL, M.D.,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does *United States v. Booker* Prohibit Sentencing Guideline Enhancements Based on Evidentiary Factors Not Charged in the Indictment or Found by a Jury Beyond a Reasonable Doubt?

2. Can the Use of an Ambiguous Medicare Statute Susceptible to Differing Reasonable Interpretations Support Fraud and False Claims Convictions?

3. Does the Mandatory Victims Restitution Act of 1996 Preclude Imposition of an Untimely Restitution Order?

LIST OF PARTIES

The parties to the proceedings in the lower tribunal are:

Gustavo E. Coll, M.D.

United States of America

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gustavo E. Coll, M.D. requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the court of appeals is unpublished, but is reproduced in the Appendix at App. 1.

JURISDICTION

The court of appeals entered its opinion on September 9, 2004, rehearing denied October 22, 2004. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254 and Supreme Court Rule 13.1. The appellate court exercised jurisdiction pursuant to 28 U.S.C. § 1291.

PROVISIONS OF LAW

U.S. Constitution, Fifth Amendment:

No persons shall . . . be deprived of life, liberty, or property without due process of law . . .

U.S. Constitution, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

18 United States Code § 3553(b):

(1) In general. – Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

STATEMENT OF THE CASE

Petitioner Gustavo E. Coll, M.D., a skilled and experienced retinal surgeon with an excellent medical reputation, was indicted in the Southern District of Florida for health care fraud, in violation of 18 U.S.C. § 1347 (Counts 1-45), and making false claims, contrary to 18 U.S.C. § 297 (Counts 46-90) (App. 2). He was found guilty by a jury on all counts, and sentenced to a 57-month prison sentence based on the district court's application of the sentencing guidelines, fined $50,000.00, and subjected to a notice of restitution in the amount of $792,952.00. His sentence was significantly enhanced by the sentencing judge to more than four years above the allowable guidelines, based on the court's unilateral determination of relevant conduct, loss calculations, offense characteristics, and obstruction of justice, all factors neither charged in the indictment nor considered by the jury.[1]

[1] The trial court's "relevant conduct" enhancement resulted in an 11-level increase in the sentencing guidelines. The court's obstruction of justice finding increased the guidelines by two additional levels.
(Continued on following page)

The criminal case against Dr. Coll challenged his billing for sophisticated laser surgery of the retina, a procedure known as PRP ("Panretinal Photocoagulation Laser"). Even though Medicare regulations do not define or describe PRP, the government offered evidence at trial that prevailing medical standards for PRP involve between 800 and 1200 individual laser burns or scarring. The government contended Dr. Coll either did not perform laser surgery at all, or used one of two less sophisticated procedures known as "focal laser" or "macular grid" laser, both of which were eligible for lower Medicare reimbursement. The government also asserted Dr. Coll billed for fundus photography and fluorescein angiography ("FA") of the eye, but did not actually perform that service. Dr. Coll's billing practices at three medical centers were challenged at trial.

For purposes of relevant conduct analysis, the government calculated the loss figure by using a method of approximating the financial losses by extrapolating the total loss from a statistical sampling, at $866,000.00. The jury made no finding as to the amount of loss.

Dr. Coll vigorously opposed the government accusations, presenting evidence of his outstanding training, experience, and reputation as an opthalmic surgeon. Dr. Coll's billing for PRP was reasonable because he practiced

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Enhancements for use of a special skill added another two levels, more than minimal planning increased the guidelines by two more levels, and conscious or reckless risk of death or serious bodily injury added two levels. The total additional increase was eight levels. Thus, the court's application of guidelines accounted for a total enhancement of 19 levels, raising Dr. Coll's sentence from a guideline range of 0-6 months to 57-71 months imprisonment, all in the absence of any jury findings. Defense counsel at trial objected to the court's enhancements.

a highly specialized, cutting edge laser technique known as subthreshold PRP, involving the use of a lower power laser that left no (or greatly reduced) scarring. The benefit to patients is that the lesser scarring promoted optimal retinal health. Such limited scarring produced by subthreshold surgery is difficult to observe by the untrained eye or through fluorescein angiography. The government discounted Dr. Coll's subthreshold procedure, asserting the laser equipment used by Dr. Coll was incapable of supporting the lower power needed, and that subthreshold scarring was readily visible on an FA.

The trial evidence was in agreement that neither Medicare nor local medical practice boards define the PRP procedure for CPT Code 67228,[2] the Medicare billing code at issue at trial. Nor does Medicare adhere to an unwritten or unannounced community standard in determining proper billing practices for PRP. Instead, the government used the catch-all provision of 42 U.S.C. § 1320c-5, entitled "Obligation of Health Care Practitioners and Providers of Health Care Services," that states:

> **§ 1320c-5. Obligations of health care practitioners and providers of health care services; sanctions and penalties; hearings and review**
>
> (a) Assurances regarding services and items ordered or provided by practitioner or provider
>
> It shall be the obligation of any health care practitioner and any other person (including a hospital or other health care facility, organization, or

[2] The CPT code book defines PRP (Code 67228) as "destruction of extensive or progressive retinopathy in one or more sessions."

> agency) who provides health care services for which payment may be made (in whole or in part) under this chapter, to assure, to the extent of his authority that services or items ordered or provided by such practitioner or person to beneficiaries and recipients under this chapter –
>
> (1) will be provided economically and only when, and to the extent medically necessary;
>
> (2) will be of a quality which meets professionally recognized standards of health care; and
>
> (3) will be supported by evidence of medical necessity and quality in such form and fashion and at such time as may reasonably be required by a reviewing peer review organization in the exercise of its duties and responsibilities.

The district court concluded this statutory language requiring that medical services "be of a quality which meets professionally recognized standards of health care 'medical necessity'" was sufficient to serve as the operative authority for a criminal health care fraud prosecution.

On direct appeal, Dr. Coll challenged his convictions and sentence on legal and evidentiary grounds. The Eleventh Circuit refused to consider Dr. Coll's argument that his sentence was unconstitutional under the principles announced in *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004), and upheld the significantly enhanced sentence. The appellate court found the evidence sufficiently supported the jury verdict and rejected the defense claim of prosecutorial misconduct encompassed within the government's practice of expressing a personal belief in Dr. Coll's guilt and in the innocence of the principal government witness.

The Eleventh Circuit upheld the 2-level obstruction of justice enhancement, even though Dr. Coll was never charged with or convicted of obstructing justice, based on an application of Sentencing Guideline § 3C1.1 (charged with or convicted of obstruction or perjury). That court also upheld the 11-level enhancement for loss calculation based on the government proof "by a preponderance of the evidence." The appellate court further found that inclusion of relevant conduct in determining the allowable sentence was proper. App. 7-9. The court upheld the amount of restitution, but remanded the case to the district court with instructions that it enter a written restitution order including a repayment schedule.

REASONS FOR GRANTING THE WRIT

I. *United States v. Booker* Prohibits Sentencing Guideline Enhancements Based on Evidentiary Factors Not Charged in the Indictment or Found by a Jury Beyond a Reasonable Doubt.

When imposing sentence based on evidentiary factors such as the amount of loss in a fraud scheme, the sophistication or severity of the offense conduct, or a defendant's inconsistent trial testimony, a court is not free to determine those factors in the absence of a jury determination of the facts beyond a reasonable doubt and based on a sufficient allegation in the indictment, a rule governed by the decision in *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004). When an indictment specifies the amount of money involved in charged offense conduct, neither the prosecution nor the sentencing judge is free to make separate determinations in order to reach facts not presented to the jury. To do so violates the principal

objective of *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348 (2000), in which this Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt."

This court's recent decision in *United States v. Booker*, ___ U.S. ___, 2005 WL 50108 (Jan. 12, 2005), concluded the sentencing guidelines were advisory only, such that a sentence based on facts determined by a judge alone violates the Sixth Amendment guarantee of a jury trial. Unproven crimes and facts not reflected in jury verdicts do not support a sentence based on enhancements to the sentencing guidelines.

Whereas the Eleventh Circuit approach, prior to *Booker*, has been to reject the application of *Apprendi* to the Federal Sentencing Guidelines whenever the sentence is seemingly within the statutory maximum, notwithstanding the previously acknowledged binding impact of lower sentencing guidelines, *e.g., United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001) (*en banc*), other courts have recognized that any fact altering a defendant's range of punishment is subject to the *Apprendi* analysis. In this case, the Eleventh Circuit approved the district court's reliance on unproven relevant conduct to increase petitioner Dr. Coll's sentence *by a magnitude of more than four years*. The Eleventh Circuit's inconsistency with *Booker* and its progeny calls out for Supreme Court review as a component of national uniformity and constitutional

certainty.[3] *See United States v. Mack*, 229 F.3d 226 (3rd Cir. 2000), (Becker, C.J., concurring); *United States v. Norris*, 143 F. Supp. 2d 243 (E.D. N.Y. 2001) (relevant conduct that increases a defendant's sentencing exposure must be found by the jury beyond a reasonable doubt).

Booker rectifies this inconsistency in its announcement that sentencing facts must be determined by the jury. Unfortunately, the appellate court's approval of petitioner's significantly enhanced 57-month sentence in this case conflicts with *Booker*, *Blakely*, and *Apprendi*, allowing a sentence to be based on unproven facts decided only by the judge. Dr. Coll's enhanced sentence was the result of seven factors, none of which flowed directly from the elemental foundation necessary for the jury's determination of guilt.[4]

Consistent with this Court's ruling in *Booker*, compelling the involvement of the jury in any fact resulting in the imposition of an enhanced penalty, the Eleventh Circuit's ruling violates the constitutional principles identified in *Ring v. Arizona*, 536 U.S. 584 (2002). This direct conflict

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[3] Dr. Coll is eligible for *Booker* relief in accordance with *Booker's* conclusion that "we must apply today's holdings – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – to all cases on direct review." *Booker*, at *29 (Breyer, J.). Dr. Coll, having objected to the unproven factors at sentencing and having challenged his sentencing on *Blakely* grounds on appeal, is entitled to relief from this Court.

[4] The sentencing enhancements found by the district court alone included amount of loss, special skill, obstruction of justice, relevant conduct, more than minimal planning, and risk of death, none of which were essential elements of the health care fraud and false claims convictions. Those enhancements resulted in a 19-level increase in the sentencing, raising Dr. Coll's sentence from probation (or imprisonment for six months) to 57 months incarceration.

with *Booker* warrants the exercise of certiorari review, in order to instruct the Eleventh Circuit that the sentencing enhancements in this case are not authorized as a matter of law.

II. The Use of an Ambiguous Medicare Statute Susceptible to Differing Reasonable Interpretations Cannot Support Fraud and False Claims Convictions.

Dr. Coll's convictions for 90 counts of health care fraud and making false claims were based on a novel prosecution theory that his practice of treating patients with subthreshold laser therapy was inconsistent with prevailing medical standards, and thus his Medicare and insurer billings for PRP were fraudulent. The catch-all provision of 42 U.S.C. § 1320c-5, the only basis for the prosecution contention that petitioner Dr. Coll engaged in health care fraud and false claims, cannot establish a foundation for the government's prosecution theory.

The Eleventh Circuit, by upholding Dr. Coll's convictions, created irreconcilable conflict with the decisions of other circuits on the same question of law. Notably, in *United States v. Miglaccio*, 34 F.3d 1517, 1524 (10th Cir. 1994), the court held that a conviction founded on an ambiguous statute is defective unless the government has proven "beyond a reasonable doubt that there is no reasonable interpretation of the situation that would make the defendant's statements factually correct." Under this prevailing legal standard, the evidence must show beyond a reasonable doubt that the interpretative statute or regulation rejected petitioner's position that subthreshold laser was properly used to treat patients, and correctly billed as PRP. *See also United States v. Johnson*, 937 F.2d

392, 399 (8th Cir. 1991) ("the Government must negate any reasonable interpretation that would make the defendant's statement factually correct."); *United States v. Parker*, 364 F.3d 934, 944 (8th Cir. 2004) (external source of ambiguity requires government to disprove all contrary interpretations of allegedly false statements).

This "reasonable interpretation" analysis requires the use of an objective standard because the threshold issue of actual falsity is wholly separate and apart from the element of culpable intent, a distinct component of a fraud and false statement prosecution that must separately be proven beyond a reasonable doubt. Thus, in reversing a false statement conviction, the Fourth Circuit explained in *United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980):

> In light of these ambiguities, under Counts II-V of the indictment, it was incumbent upon the Government to introduce proof sufficient to establish the falsity of the statements as well as the defendant's knowing and willful submission of the statements. . . .

The Eleventh Circuit's approval of petitioner's convictions, based on its finding "that a reasonable jury could have reached the conclusion that Coll was guilty of the alleged charges beyond a reasonable doubt[,]" misstates the applicable rule and is in conflict with the "reasonable interpretation" standard utilized by the other circuits. Within the Fourth Circuit, as well as in the Fifth, Eighth, Ninth, and Tenth Circuits, Dr. Coll's convictions would not have been upheld. As the Fourth Circuit found in *Race*, the prosecution's exclusive focus on a defendant's lack of good faith or the existence of criminal intent – without disproving the reasonableness of the statutory interpretation – does not address the pivotal issue:

> . . . We are somewhat uncertain whether the Government, by this contention, is arguing that lack of good faith makes irrelevant the question whether the action of the defendants was proper and within the reasonable interpretation of the contract. If so, it overlooks the fact that, in order to make out an offense under § 1001, the Government must prove both the falsity of the statement and, in addition, that the utterer knew the statement was false. *See United States v. Weatherspoon*, 581 F.2d at 602. It thus makes no difference what the defendants thought if CSI's billings were authorized under a reasonable interpretation of the contract; their thought in that regard becomes important if, but only if, the billing was false, that is, was not within the reasonable construction of the contract.

United States v. Race, 632 F.2d at 1120;[5] *United States v. Woodley*, 9 F.3d 774 (9th Cir. 1993) (fraud conviction requires knowing, intentional violation of Medicare requirements sufficient to support the essential criminal intent for false claims and health care fraud convictions).

This erroneous approach demonstrates the dangers inherent in prosecuting a highly-trained physician for cutting edge medical practices that have not yet achieved unanimity of approval within the medical community, when Medicare regulations neither define nor reject the

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[5] Although the Eleventh Circuit decision in *United States v. Whiteside*, 285 F.2d 1345 (11th Cir. 2002), reversed a false statement conviction in a health care fraud prosecution because the government failed to prove the defendant's interpretation of an ambiguous Medicare regulation was unreasonable, the Eleventh Circuit failed to follow that rule in petitioner Dr. Coll's appeal, concluding instead only that a reasonable jury could have found Dr. Coll guilty.

physician's chosen procedure. The damage to physicians generally and the medical community particularly from the unbridled application of ambiguous statutes is alarming, especially when the government is allowed to trump a physician's judgment by way of a narrow interpretation of a statute without any implementing regulations or prior application. Especially in a case involving an unblemished physician with no history of disreputable conduct, "[c]riminal sanctions should not be imposed for conduct which is not clearly illegal." *United States v. Larson*, 937 F.2d 392, 399 (8th Cir. 1986); *United States v. Porter*, 591 F.2d 1057 (5th Cir. 1979) (letters from Blue Cross could not form basis for criminal prosecution).

In view of the conflict between the Eleventh Circuit and the Fourth, Fifth, Eighth, Ninth, and Tenth Circuits, this Court should reconcile this dramatic discord because of the detrimental impact of the Eleventh Circuit decision on physicians in the Southeast United States whose good faith exercise of their professional judgment puts them at risk for billing Medicare when they engage in conduct that comes within a reasonable interpretation of the authorizing statute. This Court's prior admonition regarding the boundless application of criminal statutes by aggressive prosecutors in *Dunn v. United States*, 442 U.S. 100, 112 (1979),[6] has gone ignored in the Eleventh Circuit. This case is the appropriate vehicle to remind the Eleventh Circuit of the limitations of the criminal law, while

[6] "Thus, to ensure that a legislation speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not plainly and unmistakably proscribed."

protecting the right of physicians to practice their craft in good faith.

III. The Mandatory Victims Restitution Act of 1996 Precludes Imposition of an Untimely Restitution Order.

The Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. §§ 3663-3664 (2000), revamped restorative criminal jurisprudence in a number of important respects. No feature of this legislation is more critical to this case than the jurisdictional requirement that a final order of restitution must be entered within 90 days of the imposition of sentence when victim losses are not ascertainable at sentencing. 18 U.S.C. § 3664(d)(5). The Eleventh Circuit ignored that statutory command in approving an untimely and thereby unenforceable restitution order.

In order to be valid under the MVRA, a final restitution order must be entered within 90 days of sentencing. 18 U.S.C. § 3664(d)(5).[7] In this case, the court imposed sentence on May 19, 2003, without ordering restitution. The judge deferred restitution for a period of 90 days.[8] The 90-day limitation period mandated by § 3664(d)(5) expired

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[7] "If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. . . ." *Id.*

[8] The plain language of the MVRA requires the district court to order restitution "in the *full* amount of each victim's losses as determined by the district court." *United States v. Futrell*, 209 F.3d 1286, 1290 (11th Cir. 2000) (emphasis added).

on August 17, 2003, during which time no valid "final order of restitution" was entered.[9]

District courts are required "to determine the amount of restitution within the 90-day limitations period." *United States v. Kapelushnik*, 306 F.3d 1090, 1093 (11th Cir. 2002) (citing *United States v. Maung*, 267 F.3d 1113, 1121 (11th Cir. 2001)). The plain language of § 3664(d)(5) requires entry of a restitution order within the 90-day limitation period and "where, as here, the district court fails to make such a determination within the 90-day limitation period, the judgment of conviction becomes final and contains no enforceable restitution provision." *United States v. Kapelushnik*, 306 F.3d at 1093-94 (citing *United States v. Jolivette*, 257 F.3d 581, 584 (6th Cir. 2001) ("[W]e hold that when the 90-day clock runs out, the judgment of conviction and sentence, including the restitution provision, becomes final by operation of statute."). *See also United States v. Stevens*, 211 F.3d 1, 5 (2d Cir. 2000); *United States v. Grimes*, 173 F.3d 634, 639-40 (7th Cir. 1999).

Undeniably, as the district court failed to determine the amount of restitution within 90 days of sentencing, the

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[9] The sentencing judge entered a written Judgment in a Criminal Case on May 21, 2003, and an Amended Judgment in a Criminal Case (pursuant to Fed.R.Crim.P. 36) on June 2, 2003, both of which mirrored the court's language at sentencing stating that "the court *will* enter an order of restitution in an amount to be determined at a later date." In any event, the oral pronouncement controls with respect to any conflict in the written judgment. *See United States v. Bates*, 213 F.3d 1336, 1340 (11th Cir.), *cert. denied*, 531 U.S. 1056, 121 S. Ct. 666 (2000) (where a written judgment conflicts with the oral pronouncements of the sentencing judge, the oral pronouncement at sentencing controls). Here, there is no actual conflict. Any reference to restitution in the amount of $792,952.19 in the pronouncement of sentence or on the judgment was illusory and had no enforceable validity as a formal order of restitution required by operation of law.

judgment of conviction became final by operation of law at the expiration of the limitations period and the judgment contained no enforceable restitution provision. *Kapelushnick*, 306 F.3d at 1094. Yet, the Eleventh Circuit disregarded that plain statutory mandate in approving the restitution determination. Because the appellate court's ruling is inconsistent with statutory restitution requirements, this Court should clarify the effect of the mandatory 90-day restitution rule.

CONCLUSION

The Eleventh Circuit decision in this case is inconsistent with fundamental notions of the Sixth Amendment right to a jury trial, and threatens principles of due process and individual liberty. Certiorari review is necessary to correct the Eleventh Circuit's erroneous mandatory application of the sentencing guidelines, and also to rectify the imbalance within the circuits so as to restore due process notice to the criminal justice system within the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12819

D.C. Docket No. 02-20363-CR-DMM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GUSTAVO E. COLL,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(Filed September 9, 2004)

Before ANDERSON and BIRCH, Circuit Judges, and LAND*, District Judge.

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* Honorable Clay D. Land, United States District Judge for the Middle District of Georgia, sitting by designation.

LAND, District Judge:

BACKGROUND

Gustavo Coll appeals (1) his convictions for health care fraud, in violation of 18 U.S.C. § 1347, and making false claims, in violation of 18 U.S.C. § 287; and (2) his 57-month prison sentence. Coll contends that the evidence presented at trial was insufficient to convict him and that the district court made various erroneous evidentiary rulings at trial. In challenging his sentence, Coll argues that the district court erred in enhancing his sentence for obstruction of justice, pursuant to U.S. Sentencing Guidelines Manual § 3C1.1 (hereinafter "U.S.S.G."), and in calculating the amount of loss, pursuant to U.S.S.G. § 2F1.1.[1] Coll also contends that he does not owe any restitution because the district court failed to enter a valid restitution order.[2]

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[1] The probation officer used the 2000 edition of the Sentencing Guidelines Manual in calculating Coll's recommended sentencing range. Section 2F1.1 was consolidated with U.S.S.G. § 2B1.1 in 2001. *See* Guidelines App. C, amend. 617.

[2] Coll also filed a Motion to File a Supplemental Brief so that he could argue for the first time that his sentence is unconstitutional under *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (2004). Since Coll failed to raise a *Blakely* claim in his initial brief on appeal, he has abandoned any such claim, and his Motion to File a Supplemental Brief on this issue is denied. *See United States v. Levy*, ___ F.3d ___ (11th Cir. Aug. 3, 2004) (by failing to include *Blakely* claim in his initial brief on appeal, appellant abandoned issue on appeal); *see also United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000); *United States v. Ford*, 270 F.3d 1346, 1347 (11th Cir. 2001); *United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001); *Hartsfield v. Lemacks*, 50 F.3d 950, 953 (11th Cir. 1995); *McGinnis v. Ingram Equipment Co., Inc.*, 918 F.2d 1491, 1495-96 (11th Cir. 1990) (en banc).

We find that sufficient evidence supports Coll's conviction, that the district court did not commit reversible error in its evidentiary rulings, and that the prison sentence of 57 months is authorized under the federal Sentencing Guidelines. Therefore, Coll's conviction and prison sentence are affirmed. We further find, however, that the district court's failure to enter a written restitution order that included a repayment schedule requires that the case be remanded with instructions that the district court enter a written restitution order consistent with this Opinion.

DISCUSSION

I. Jury Verdict and Trial Issues

The Court reviews *de novo* Coll's claim that the evidence presented at trial was insufficient to support the jury's guilty verdict. *United States v. Lyons*, 53 F.3d 1198, 1200 (11th Cir. 1995). Coll's conviction must be affirmed unless no reasonable jury could have concluded from the evidence at trial that he was guilty beyond a reasonable doubt. *Id.* Having reviewed the entire record, it is clear that a reasonable jury could have reached the conclusion that Coll was guilty of the alleged charges beyond a reasonable doubt. Accordingly, sufficient evidence exists to support the jury's verdict of guilty.

The district court's evidentiary rulings are reviewed for abuse of discretion. *United States v. Fortenberry,* 971 F.2d 717, 721 (11th Cir. 1992). We have reviewed each of the evidentiary rulings challenged by Coll and find that the district court did not abuse its discretion in making those rulings. We have also reviewed the district court's alleged refusal to give a "theory of defense" jury instruction and find that the district court did not abuse its

discretion. *United States v. Chirinos,* 112 F.3d 1089, 1101 (11t Cir. 1997).

We also reject Coll's contention that he is entitled to a new trial because of alleged prosecutorial misconduct. Prosecutorial misconduct requires reversal only if it permeates the entire trial, *United States v. Thomas,* 8 F.3d 1552, 1561 (11th Cir. 1993), and if there is a reasonable probability that, but for the misconduct, the trial outcome would have been different. *Sexton v. Howard,* 55 F.3d 1557, 1559 (11th Cir. 1995). Our review of the record discloses no prosecutorial misconduct permeating the entire trial, and we are unconvinced that the trial outcome would have been any different had the prosecutor not engaged in the conduct complained of by Coll.

Based on the foregoing, Coll's conviction must stand.

II. Sentencing Issues

A. Obstruction of Justice Enhancement

The district court applied a two-level enhancement to Coll's offense level for obstruction of justice. Coll argues that the district court failed to find with sufficient specificity that Coll committed perjury because it did not identify willful and materially false testimony by Coll that was not a result of mistake or confusion.

We review a district court's finding that a defendant's conduct warrants an obstruction of justice enhancement for clear error. *United States v. Patti,* 337 F.3d 1317, 1324 (11th Cir. 2003), *cert. denied,* 124 S. Ct. 1146 (2004). The Sentencing Guidelines ("Guidelines") provide for a two-level enhancement for obstruction "[i]f (A) the defendant willfully obstructed or impeded, or attempted to obstruct

or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct. . . ." U.S.S.G. § 3C 1.1. "[C]ommitting, suborning, or attempting to suborn perjury" constitutes obstruction of justice under the Guidelines. U.S.S.G. § 3C1.1, cmt. n.4(b). Perjury for § 3C1.1 is defined as "false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *United States v. Dunnigan,* 507 U.S. 87, 94, 113 S. Ct. 1111, 122 L. Ed. 2d 445 (1993), *abrogated on other grounds, United States v. Wells,* 519 U.S. 482, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997). Materiality under this Guideline is "evidence, fact, statement, or information, that, if believed, would tend to influence or affect the issue under determination." U.S.S.G. § 3C1.1, cmt. n.6.

We conclude that the district court did not clearly err in enhancing Coll's sentence for obstruction of justice. Contrary to Coll's contention that the district court's reasons for applying the enhancement were not specific, the district court made the following specific findings: (1) Coll constructed his subthreshold treatment defense to confuse the jury; (2) Coll failed to inform his patients or his peers that he was performing subthreshold procedures, and his failure to mention the treatment on patient charts made his testimony suspect; and (3) Coll never sufficiently explained why his charts indicated one diagnosis while he billed for another. Therefore, the district court's findings were sufficient to support its conclusion that Coll's subthreshold explanation was an elaborate and false story constituting obstruction of justice.

The record supports the district court's obstruction findings. First, as Coll conceded, other witnesses contradicted his testimony, providing one basis for the district court to determine that Coll's testimony was untruthful. Second, Coll testified that experts who had not been trained in the subthreshold procedure would not be able to distinguish between pigmentation mottling caused by subthreshold treatment and normal pigment coloration. However, Dr. Thomas Friberg, an expert in subthreshold treatment of whom Coll had spoken highly during direct examination, testified that subthreshold treatment is visible in fluorescein angiographies and becomes more apparent over time. Third, while Coll asserted that he used an argon laser to perform subthreshold treatments, Dr. Friberg testified that an argon laser is not capable of performing the procedure. Fourth, in examining the laser parameters of a patient upon whom Coll had claimed to have performed subthreshold treatment, Dr. Friberg did not see any evidence of subthreshold treatment. Finally, despite Coll's claims of his continued use of the subthreshold procedure, he never published articles about it, gave lectures on it, spoke to patients about it, told his colleagues about it, or indicated on patients' charts that he performed it.

Coll's testimony regarding the subthreshold theory was a material fact in the case because he used the subthreshold treatment theory as a significant part of his defense to avoid criminal liability, and, if the jury had believed his testimony, he would have escaped criminal liability for those counts in which he claimed to be doing subthreshold treatment. With witnesses contradicting Coll on this material issue of fact, especially Dr. Friberg, an expert on the subthreshold procedure, we conclude that

sufficient evidence exists in the record supporting the district court's obstruction of justice finding.

B. Actual Loss Calculation

The district court, pursuant to U.S.S.G. § 2F1.1(b)(1)(L), increased Coll's offense level by 11 after calculating the loss caused by Coll's criminal conduct to be between $800,000 and $1,500,000. Coll argues that the district court's loss determination was "materially flawed" because it used an unscientific and unreliable sampling of patients. Coll also argues that the district court improperly failed to offset the loss amount by the value of the services rendered. Finally, Coll, citing U.S.S.G. § 1B1.3(a)(1)(B), contends that because 18 U.S.C. § 1347 involves a scheme contemplating joint criminal activity, the court was required to determine the scope of the defendant's relevant conduct, the foreseeability of conduct, and the extent to which the scheme was in furtherance of the fraud.

We review a district court's loss calculation for clear error, *United States v. Nostari-Shamloo*, 255 F.3d 1290, 1291 (11th Cir. 2001) (per curiam), and its determination of relevant conduct *de novo*. *United States v. Aired*, 144 F.3d 1405, 1418 (11th Cir. 1998). The government must prove loss by a preponderance of evidence. *United States v. Dabbs*, 134 F.3d 1071, 1081 (11th Cir. 1998). Section 2F1.1 "compels the district court to increase a defendant's offense level based on the loss attributable to that defendant." *Id.* Where the loss is between $800,000 and $1,500,000, the offense level is increased by 11 U.S.S.G. § 2F1.1(b)(1)(L). The "cumulative loss" from a common fraudulent scheme should be used in determining the offense level where the fraudulent scheme involves a

multiple-count indictment. U.S.S.G. § 2F1.1, cmt. n.7. The Guidelines do not require that the loss be determined precisely, allowing the court instead to "make a reasonable estimate of the loss, given the available information." U.S.S.G. § 2F1.1, cmt. n.9. However, the loss should be reduced by the services that a defendant provides. U.S.S.G. § 2B1.1, cmt. n.2(E)(i)) (2001).[3]

We conclude that the district court did not clearly err in calculating the amount of loss. First, the district court did not rely on unreliable statistical methodology. The district court found the government's witness who testified that he used generally accepted statistical formulas to calculate the loss to be credible. While the government's extrapolation method of loss calculation did not determine the exact amount of loss, the figure was a reasonable estimate because it was calculated with accepted statistical formulas. *See* U.S.S.G. § 2F1.1, cmt. n.9. Second, Coll's argument that the district court failed to offset the actual loss with the services rendered is likewise without merit. We find that the loss calculations adequately accounted for the services that Coll actually performed.

Finally, we reject Coll's contention that the district court failed to make relevant conduct findings as required by U.S.S.G. § 1B1.3(a)(1)(B). Coll was found guilty of multiple counts. Therefore, the district court was authorized under the Guidelines to include in relevant conduct

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[3] We view clarifying amendments to the Guidelines retroactively. *United States v. Armstrong*, 347 F.3d 905, 908 (11th Cir. 2003). Section 2F1.1 was consolidated with U.S.S.G. § 2B1.1 in 2001 and was amended to include a revised, common definition of loss, which provided for the exclusion of economic benefits transferred to victims from the loss calculation. *See* Guidelines App. C, amend. 617.

acts that Coll committed and acts that Coll aided and abetted in committing that were part of the same course of conduct or common criminal scheme as his fraud conviction. *See* U.S.S.G. § 1 B 1.3(a)(2). A "common scheme or plan" involves two or more offenses that are connected by a common factor such as a common victim or a common *modus operandi.* U.S.S.G. § 1B1.3, cmt. n.9. The "same course of conduct" involves offenses that "are sufficiently connected or related to each other as to warrant the conclusion that they are part of a[n] . . . ongoing series of offenses." U.S.S.G. § 1B1.3, cmt. n.9(B). Where an offense involves joint conduct, "all reasonably foreseeable acts" of others in the joint undertaking are considered relevant conduct. U.S.S.G. § 1B1.3(a)(1)(B). The evidence supported findings that:

> (1) Coll omitted or delayed recording the results of fluorescein angiographies in a number of patients' charts; and (2) Coll performed procedures unnecessarily, billed for treatments that did not match the procedure actually performed, and billed for procedures never performed. Therefore, Coll's relevant conduct includes fraudulent billing for procedures that were not directly included in his offense of conviction because that conduct involved the same type conduct supporting his conviction: using various patients to overbill Medicare for unperformed or needlessly performed procedures. Based on this evidence of overbilling for a variety of procedures, we conclude that the district court did not err in its determination of the actual loss caused by Coll's relevant conduct.

C. Restitution

The district court never entered a final written restitution order. However, the final judgment indicates that Coll owes restitution to Medicare in the amount of $792,952.19. The judgment also notes that since there are other victims whose losses were unknown at the time of sentencing, the district court would enter an order of restitution at a later date. The district court never held a subsequent restitution hearing because the parties ultimately stipulated that Coll's total restitution amount was $812,216.99. Coll argues that because the district court failed to enter a written restitution order within 90 days of his sentencing as required by 18 U.S.C. § 3664(d)(5), the restitution provision in the judgment of conviction is not enforceable.[4]

We review a district court's restitution calculation for an abuse of discretion. *Cani v. United States,* 331 F.3d 1210, 1212 (11th Cir. 2003). However, the legality of a restitution order is reviewed *de novo. United States v. Yeager,* 331 F.3d 1216, 1227 (11th Cir. 2003). "[R]estitution is mandatory, without regard to a defendant's ability to pay, when the crimes of conviction are fraud- or deceit-based offenses. . . ." *Id.; see also* 18 U.S.C. § 3663A(c)(1)(A)(ii) (making restitution mandatory for "any offense committed by fraud or deceit"). The Mandatory Victims Restitution Act (MVRA) requires a district court to award the full amount

[4] In challenging restitution, Coll also argues that: (1) the district court failed to make independent factual findings regarding the amount or type of restitution; (2) the court wrongly equated actual loss with restitution; and (3) the probation officer did not fulfill his duty by providing within 35 days of sentencing sufficient information for the court to make a restitution order. Because these arguments have no merit, we will not address them.

of restitution to any victim. 18 U.S.C. § 3664(f)(1)(A); *United States v. Futrell,* 209 F.3d 1286, 1292 (11th Cir. 2000). Although the government must prove the restitution amount by a preponderance of evidence, 18 U.S.C. § 3664(e), the district court is not required to determine restitution with absolute precision when it is impossible to determine the exact amount, and there is a basis for reasonable approximation. *Futrell,* 209 F.3d at 1292.

A district court's restitution order must also include the schedule and manner of the restitution payment. 18 U.S.C. § 3664(f)(2)(A)-(C); *see also United States v. Jones,* 289 F.3d 1260, 1265 (11th Cir. 2002), *cert. denied,* 537 U.S. 1049 (2002). A district court cannot delegate the determination of the repayment schedule for restitution. *United States v. Prouty,* 303 F.3d 1249, 1254-55 (11th Cir. 2002).

We have held that a district court must enter a restitution order within 90 days of sentencing. *United States v. Maung,* 267 F.3d 1113, 1122 (11th Cir. 2001); *see also* § 3664(d)(5). Therefore, where the district court fails to make a restitution determination within the 90-day period, the judgment of conviction becomes final and does not contain an enforceable restitution provision. *United States v. Kapelushnik,* 306 F.3d 1090, 1093-94 (11th Cir. 2002).

We find that the district court at the sentencing hearing properly calculated Coll's restitution obligation to Medicare in the amount of $792,952.19. However, because the district court did not calculate Coll's additional restitution obligations to the other victims within 90 days of sentencing, no restitution is owed to those other victims. *See* 18 U.S.C. § 3664(d)(5); *Kapelushnik,* 306 F.3d at 1093-94.

Coll argues that he should be excused from paying any restitution to Medicare because no written restitution order was entered within 90 days of sentencing. Although we require a district court to impose a final restitution order within 90 days of sentencing, *Maung*, 267 F.3d at 1122, we find in this case that the district court did calculate Coll's final restitution obligation to Medicare at the sentencing hearing and informed the parties of this restitution order. This amount was included in the final judgment. Thus, the court made a restitution determination within 90 days of sentencing. *See Kapelushnik*, 306 F.3d at 1093 (noting that § 3665(d)(5) requires district courts "to determine the *amount* of restitution within the 90-day limitations period") (emphasis added). We refuse to absolve Coll from this restitution obligation simply because the district court failed to reduce its *ore tenus* order to writing within 90 days of its issuance. To do so would create an absurd result. *See Maung*, 267 F.3d at 1122. Therefore, we find that Coll is obligated to pay restitution to Medicare in the amount of $792,952.19.

We do find, however, that the district court erred by not determining Coll's schedule of repayment as required by the MVRA. *See* 18 U.S.C. § 3664(f)(2); *Jones*, 289 F.3d at 1265. Therefore, we vacate the portion of the judgment that includes the restitution order and remand this matter to the district court with instructions that it enter a final restitution order ordering Coll to pay Medicare $792,952.19 in restitution and that the district court determine the proper schedule of repayments.

CONCLUSION

Coll's conviction and prison sentence of 57 months are affirmed. The portion of the judgment imposing restitution

is vacated, and the case is remanded to the district court with instructions that it enter a written restitution order consistent with this Opinion.

AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

UNITED STATES DISTRICT COURT

SOUTHERN District of FLORIDA

(Filed Jun. 2, 2003)

UNITED STATES OF AMERICA

V.

GUSTAVO E. COLL

Date of Original Judgment: 5-21-2003

(Or Date of Last Amended Judgment)

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 1:02CR20363-Middlebrooks

David Kalman Tucker, Esq.
Joan Silverstein, AUSA
Defendant's Attorney

Reason for Amendment:

☐ Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))

☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))

☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P.

X Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))

☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))

☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☐ Direct Motion to District Court Pursuant to
☐ 28 U.S.C. § 2255 OR
☐ 18 U.S.C. § 3559(c)(7)
Modification of Restitution Order (18 U.S.C. § 3664)

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1 THRU 90 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. 1347 and 2	Health Care fraud	6-12-1997	1
18 U.S.C. 1347 and 2	Health Care fraud	8-18-1997	2
18 U.S.C. 1347 and 2	Health Care fraud	9-2-1997	3
18 U.S.C. 1347 and 2	Health Care fraud	9-15-1997	4
18 U.S.C. 1347 and 2	Health Care fraud	9-29-1997	5

The defendant is sentenced as provided in pages 2 thru 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of

any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 261-77-7795

Defendant's Date of Birth: 12-28-1963

Defendant's USM No.: 62753-004

Defendant's Residence Address:

10840 SNAPPER CREEK ROAD
MIAMI, FLORIDA 33156

Defendant's Mailing Address:

10840 SNAPPER CREEK ROAD
MIAMI, FLORIDA 33156

June 2, 2003
Date of Imposition of Judgment

/s/ Donald M. Middlebrooks
Signature of Judicial Officer

Donald M. Middlebrooks,
United States District Judge
Name & Title of Judicial Officer

June 2, 2003
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. 1347 and 2	Health care fraud	9-30-1997	6
18 U.S.C. 1347 and 2	Health care fraud	10-13-1997	7

18 U.S.C. 1347 and 2	Health care fraud	12-23-1997	8
18 U.S.C. 1347 and 2	Health care fraud	12-23-1997	9
18 U.S.C. 1347 and 2	Health care fraud	12-23-1997	10
18 U.S.C. 1347 and 2	Health care fraud	12-23-1997	11
18 U.S.C. 1347 and 2	Health care fraud	12-23-1997	12
18 U.S.C. 1347 and 2	Health care fraud	1-20-1998	13
18 U.S.C. 1347 and 2	Health care fraud	2-3-1998	14
18 U.S.C. 1347 and 2	Health care fraud	3-2-1998	15
18 U.S.C. 1347 and 2	Health care fraud	3-2-1998	16
18 U.S.C. 1347 and 2	Health care fraud	3-6-1998	17
18 U.S.C. 1347 and 2	Health care fraud	3-17-1998	18
18 U.S.C. 1347 and 2	Health care fraud	3-17-1998	19
18 U.S.C. 1347 and 2	Health care fraud	3-17-1998	20
18 U.S.C. 1347 and 2	Health care fraud	4-15-1998	21
18 U.S.C. 1347 and 2	Health care fraud	4-15-1998	22
18 U.S.C. 1347 and 2	Health care fraud	10-23-1998	23
18 U.S.C. 1347 and 2	Health care fraud	10-23-1998	24
18 U.S.C. 1347 and 2	Health care fraud	10-28-1998	25
18 U.S.C. 1347 and 2	Health care fraud	10-29-1998	26

18 U.S.C. 1347 and 2	Health care fraud	12-9-1998	27
18 U.S.C. 1347 and 2	Health care fraud	12-11-1998	28
18 U.S.C. 1347 and 2	Health care fraud	1-8-1999	29
18 U.S.C. 1347 and 2	Health care fraud	4-16-1999	30
18 U.S.C. 1347 and 2	Health care fraud	5-13-1999	31
18 U.S.C. 1347 and 2	Health care fraud	6-11-1999	32
18 U.S.C. 1347 and 2	Health care fraud	7-22-1999	33
18 U.S.C. 1347 and 2	Health care fraud	9-8-1999	34
18 U.S.C. 1347 and 2	Health care fraud	10-4-1999	35
18 U.S.C. 1347 and 2	Health care fraud	11-1-1999	36
18 U.S.C. 1347 and 2	Health care fraud	11-1-1999	37
18 U.S.C. 1347 and 2	Health care fraud	12-8-1999	38
18 U.S.C. 1347 and 2	Health care fraud	1-18-2000	39
18 U.S.C. 1347 and 2	Health care fraud	1-24-2000	40
18 U.S.C. 1347 and 2	Health care fraud	2-14-2000	41
18 U.S.C. 1347 and 2	Health care fraud	2-21-2000	42
18 U.S.C. 1347 and 2	Health care fraud	3-13-2000	43
18 U.S.C. 1347 and 2	Health care fraud	3-13-2000	44

18 U.S.C. 1347 and 2	Health care fraud	4-27-2000	45
18 U.S.C. 287 and 2	False Claims	6-12-1997	46
18 U.S.C. 287 and 2	False Claims	8-18-1997	47
18 U.S.C. 287 and 2	False Claims	9-2-1997	48
18 U.S.C. 287 and 2	False Claims	9-15-1997	49
18 U.S.C. 287 and 2	False Claims	9-29-1997	50
18 U.S.C. 287 and 2	False Claims	9-30-1997	51
18 U.S.C. 287 and 2	False Claims	10-13-1997	52
18 U.S.C. 287 and 2	False Claims	12-23-1997	53
18 U.S.C. 287 and 2	False Claims	12-23-1997	54
18 U.S.C. 287 and 2	False Claims	12-23-1997	55
18 U.S.C. 287 and 2	False Claims	12-23-1997	56
18 U.S.C. 287 and 2	False Claims	12-23-1997	57
18 U.S.C. 287 and 2	False Claims	1-20-1998	58
18 U.S.C. 287 and 2	False Claims	2-3-1998	59
18 U.S.C. 287 and 2	False Claims	3-2-1998	60
18 U.S.C. 287 and 2	False Claims	3-2-1998	61
18 U.S.C. 287 and 2	False Claims	3-6-1998	62
18 U.S.C. 287 and 2	False Claims	3-17-1998	63

18 U.S.C. 287 and 2	False Claims	3-17-1998	64
18 U.S.C. 287 and 2	False Claims	3-17-1998	65
18 U.S.C. 287 and 2	False Claims	4-15-1998	66
18 U.S.C. 287 and 2	False Claims	4-15-1998	67
18 U.S.C. 287 and 2	False Claims	10-23-1998	68
18 U.S.C. 287 and 2	False Claims	10-23-1998	69
18 U.S.C. 287 and 2	False Claims	10-28-1998	70
18 U.S.C. 287 and 2	False Claims	10-29-1998	71
18 U.S.C. 287 and 2	False Claims	12-9-1998	72
18 U.S.C. 287 and 2	False Claims	12-11-1998	73
18 U.S.C. 287 and 2	False Claims	1-8-1999	74
18 U.S.C. 287 and 2	False Claims	4-16-1999	75
18 U.S.C. 287 and 2	False Claims	5-13-1999	76
18 U.S.C. 287 and 2	False Claims	6-11-1999	77
18 U.S.C. 287 and 2	False Claims	7-22-1999	78
18 U.S.C. 287 and 2	False Claims	9-8-1999	79
18 U.S.C. 287 and 2	False Claims	10-4-1999	80
18 U.S.C. 287 and 2	False Claims	11-1-1999	81
18 U.S.C. 287 and 2	False Claims	11-1-1999	82

18 U.S.C. 287 and 2	False Claims	12-8-1999	83
18 U.S.C. 287 and 2	False Claims	1-18-2000	84
18 U.S.C. 287 and 2	False Claims	1-24-2000	85
18 U.S.C. 287 and 2	False Claims	2-14-2000	86
18 U.S.C. 287 and 2	False Claims.	2-21-2000	87
18 U.S.C 287 and 2	False Claims	3-13-2000	88
18 U.S.C. 287 and 2	False Claims	3-13-2000	89
18 U.S.C. 287 and 2	False Claims	4-27-2000	90

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total total [sic] term of 57 MONTHS

AS TO COUNTS (1 THRU 90) ALL COUNTS ARE TO RUN CONCURRENTLY WITH EACH OTHER

X The court makes the following recommendations to the Bureau of Prisons:

THE DEFENDANT BE DESIGNATED TO A FACILITY IN THE SOUTH FLORIDA, AREA TO BE CLOSE TO FAMILY.

X The defendant is remanded to the custody of the United Slates Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 YEARS
AS TO COUNTS (1 THRU 90) ALL COUNTS ARE TO RUN CONCURRENTLY WITH EACH OTHER

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

☐ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply, with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record, personal history, or characteristics and shall permit the probation officer to make such notifications and confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
TOTALS	$ 9,000	$ 50,000	$

The determination of restitution is deferred until ____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant shall make restitution (including community restitution) to the following payees in the amount

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
TOTALS	$ _____	$ _____	

☐ If applicable, restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

THE COURT NOTES THAT THE DEFENDANT OWES RESTITUTION TO MEDICARE IN THE AMOUNT OF $792,952.19. HOWEVER, AS THERE ARE OTHER VICTIMS IN THIS CASE WHOSE LOSSES ARE UNKNOWN, THE COURT WILL ENTER AN ORDER OF RESTITUTION IN AN AMOUNT TO BE DETERMINED AT A LATER DATE. THE COURT SHALL SET A HEARING DATE NOT TO EXCEED 90 DAYS AFTER THIS SENTENCING DATE TO MAKE A FINAL ORDER OF RESTITUTION AND DETERMINATION OF THE REMAINING VICTIMS' LOSSES.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A x Lump sum payment of $ 9,000 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, or ☐ E below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ E below); or

C ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____

over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12819-CC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GUSTAVO E. COLL,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Oct. 22, 2004)

BEFORE: ANDERSON and BIRCH, Circuit Judges, and LAND*, District Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

/s/ R L Anderson
UNITED STATES CIRCUIT JUDGE

ORD-41

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* Honorable Clay D. Land, United States District Judge for the Middle District of Georgia, sitting by designation.